

MEMORANDUM OF LAW

DATE: September 16, 1993

TO: Jack McGrory, City Manager

FROM: City Attorney

SUBJECT: Regulation of Sale of Alcoholic Beverages

INTRODUCTION

On June 16, 1993, the City Manager presented a report to the Public Services and Safety Committee on the difficulties associated with regulating liquor businesses within the City of San Diego ("City"). The Public Services and Safety Committee requested that the City Attorney's Office analyze the recommendations that were made to expand the scope of the City's current conditional use permit ordinance. This memorandum of law analyzes the following suggested changes:

- a. Adoption of zoning ordinances. The City enact a zoning ordinance that requires liquor businesses to obtain a conditional use permit in areas in which the crime levels exceed a certain threshold or prohibits liquor businesses from being located 1,000 feet from churches, schools, parks and youth activities areas;
- b. Nonconforming uses. Pre-existing businesses would be required to comply with new conditional use permit requirements within five to seven years after the adoption of the new requirements or when businesses are found to be in violation of the State Alcoholic Beverage Control Department ("ABC") regulations or subject to ABC disciplinary actions; and
- c. Change in ownership. A previously approved conditional use permit would be reviewed by the City whenever a business license is transferred from one owner to another.

ANALYSIS

- a. Adoption of zoning ordinances

We have previously opined that the state has exclusive authority to license and regulate the purchase and sale of alcoholic beverages. Cal. Const., art. XX, S 22. However, cities and counties are not preempted from enacting zoning

ordinances that regulate the operation of liquor businesses. *Floresta, Inc. v. City Council*, 190 Cal. App. 2d 599 (1961). (See attached Memorandum of Law dated March 12, 1992, by Deputy City Attorney Joe Battaglino for a detailed discussion regarding the authority to regulate liquor businesses by zoning ordinances.)

In *Floresta*, the court upheld a San Leandro ordinance that required a conditional use permit for the establishment of a cocktail lounge if the lounge was to be located within 200 feet of a residential zone. The court reasoned that the ordinance was only a geographic restriction on the sale and use of liquor. It was not an attempt to regulate the consumption of alcohol. *Id.* at 607.

The court acknowledged that the liquor business is characterized by unique concerns that may require cities to enact zoning ordinances that regulate the location of such businesses in order to protect the public health, safety and general welfare. The court concluded: "It is a matter of common knowledge, recognized by the courts, that the sale of intoxicants is accompanied with objectionable features not common to other types of commercial enterprises and such facts constitute valid grounds for a separate classification of prohibition for the protection of the health, morals, safety, peace and convenience of the public." *Id.* n.2 at p.607.

Similarly, the court in *Town of Los Gatos v. State Board of Equalization*, 114 Cal App. 2d 344 (1956), upheld an ordinance that prohibited liquor businesses from locating in single family residential districts. The court stated that counties and cities have the right to control the districts in which various types of liquor businesses could be located.

A zoning ordinance to be upheld as valid must be considered reasonable. *Sunny Slope Water Co. v. City of Pasadena*, 1 Cal. 2d 87 (1934). In *Sunny Slope*, the Supreme Court held that if a zoning ordinance excluded a particular use, that exclusion must bear some reasonable relation to the public interest.

It is likely that the courts would uphold a zoning ordinance that requires liquor businesses to obtain a conditional use permit in areas in which the crime levels exceed a certain threshold or that prohibit such businesses from locating within a certain distance from churches, schools, parks and youth activity areas. This type of ordinance could be characterized as a geographic restriction on liquor businesses justified by the unique concerns related to the operation of such businesses.

However, zoning ordinances that result in liquor businesses

being singled out and completely prohibited would probably not be upheld by the courts as a valid zoning ordinance because of the considerable effect it would have on the use and sale of liquor.

b. Nonconforming uses

The City cannot require pre-existing liquor businesses to comply with newly created zoning ordinances. State law authorizes the continued operation of any business that sells alcoholic beverages if such business was in operation prior to the adoption of a zoning ordinance (Bus. & Prof. Code Section 23790).F

All references to section shall be to the Business and Professions Code, unless otherwise stated.

Section 23790 states in part:

Premises which had been used in the exercise of those rights and privileges at a time prior to the effective date of the zoning ordinance may continue operation under the following conditions:

(a) The premises retain the same type of retail liquor license within a license classification.

(b) The licensed premises are operated continuously without substantial change in mode or character of operation.

For purposes of this subdivision, a break in continuous operation does not include:

(1) A closure for not more than 30 days for the purpose of repair, if that repair does not increase the square footage of the business used for the sale of alcoholic beverages.

(2) The closure for restoration of premises rendered totally or partially inaccessible by an act of God or a toxic accident, if the restoration does not increase the square footage of the business used for the sale of alcoholic beverages.

In *Mussalli v. City of Glendale*, 205 Cal. App. 3d 524 (1988) the city of Glendale failed to grandfather existing service stations from a zoning ordinance that banned the sale of alcoholic beverages at service stations. The court held that the ordinance was invalid because the ordinance was in conflict with the State Constitution and Section 23790.

Section 23790 operates as a "grandfather clause" protecting the rights of pre-existing businesses that sell alcoholic beverages. Unless there is a "substantial change in mode or character of operation" existing businesses are protected or

exempted from newly adopted zoning ordinances.

If a zoning ordinance was adopted by the City that required liquor businesses to obtain a conditional use permit in order to locate in certain zones, the City could not require businesses already operating within these zones to comply with this new requirement. Moreover, it is likely that a pre-existing business could not be required to comply with a new zoning ordinance even if its liquor license is transferred to another entity, as long as the same type of license is retained, because Section 23790 extends its protection to the business "premises."

Although there is no case law on point, we could argue that businesses that are found to be in violation of ABC regulations or subject to ABC disciplinary actions resulted in a substantial change in the mode or character of operation and are no longer protected by Section 23790. However, this will need to be handled on a case-by-case basis and will depend on the particular factual situation.

c. Change in ownership

Once a liquor business has obtained a conditional use permit to operate a liquor business in a particular location, the City cannot require that business to obtain a new conditional use permit because of a change in ownership. Conditional use permits run with the land and subsequent owners succeed to any benefits which former owners enjoyed under the permit. Successive owners are also subject to the limitations in the permit and can assert no greater rights than the original permittee enjoyed. *Imperial County v. McDougal*, 19 Cal. 3d 505, 510 (1977).

In County of Imperial the court held that, since conditional use permits run with the land, McDougal, as the subsequent land owner, could enjoy the benefits of the conditional use permit he obtained from the earlier owner. McDougal was not required to obtain a new conditional use permit.

The mere transfer of a business license to a new owner does not affect the status of the conditional use permit since such permits run with the land not the user. Consequently, the City could not require a subsequent owner to obtain a new conditional use permit. However, the subsequent permit holder is subject to the same limitations originally placed on the permit and cannot assert a greater right than what was previously given. *Id.* at 512.

The City can always review a previously approved conditional use permit to determine whether there has been a violation of any of the permit's conditions or an increase or change in the permitted use. In addition, the City could provide

that conditional use permits expire at some definite time in the future.

CONCLUSION

A. The City could enact a zoning ordinance that requires liquor businesses to obtain a conditional use permit in areas in which the crime levels exceed a certain threshold or that prohibit such businesses from locating within a certain distance from churches, schools, parks and youth activity areas.

B. The City may evaluate the conditional use permit to determine whether there is a change in use or a violation of any of the permit's conditions.

C. Depending on the particular factual situation, businesses that have been found to be in violation or subject to ABC disciplinary actions could be required to comply with new zoning ordinances.

D. The City cannot require that a new conditional use permit be obtained whenever a business license is transferred to a new owner.

E. The City cannot require pre-existing businesses that had been "grandfathered" to comply with new conditional use permit requirements.

JOHN W. WITT, City Attorney

By

Ann Y. Moore

Deputy City Attorney

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Attachment

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